

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**JEFFERSON-PILOT LIFE
INSURANCE COMPANY,
PLAINTIFF**

**CASE NO. C-1-02-479
(SPIEGEL, J.)
(HOGAN, M.J.)**

VS.

**CHRISTOPHER L. KEARNEY,
DEFENDANT**

ORDER

This Court conducted an informal discovery conference on July 29, 2004, the purpose for which was to rule on Plaintiff's objections to Defendant's Interrogatories and Document Requests, all of which are directed to Defendant's claim that Plaintiff's decision to terminate the Social Security Supplement and cost of living increases from Defendant's disability benefit checks was based on bad faith.

The Court has learned that the parties' previously-filed cross-Motions for Summary Judgment are scheduled for oral argument before Judge Spiegel on August 17, 2004 and are directed to the base question in this case, whether the Plaintiff's unilateral act of terminating a portion of the coverage was a breach of the disability policy. It seems to us that after oral argument and Judge Spiegel's review of the policy and the law, he will either find the policy language clear and unambiguous on its face, a finding that will eliminate the possibility of a viable bad faith claim, or he will find the policy language ambiguous, thereby enabling it to be construed against the carrier and making relevant Defendant's discovery related to the bad faith issue.

Plaintiff has supplied the Court, in-camera, with the documents stored electronically in the case of *Jeffries v. Centre Life Insurance Company*, a recently closed disability case wherein the same lawyers, who oppose one another in this case, were also adversaries there. The point of the in-camera submission was to show that very little evidence disclosed in that case was useful



to the adversary and didn't justify the cost of retrieval. This Court finds it unnecessary to review documents from another case for the purpose of making any decisions in this case even though both cases involve claims management by DMS (Disability Management Services, Inc.).

This Court believes the resolution of the dispute to hinge on a practical consideration, not a legal question. There is no need to compel the retrieval of electronic information until we know whether or not the policy language is or is not clear, a determination that must be made by the trial judge. Following Judge Spiegel's order directed to that issue, the parties shall contact this Court for the purpose of scheduling another informal discovery conference wherein the Court would want to see Plaintiff's Interrogatories and Document Requests and Plaintiff's Answers containing its objections, in the event that the trial judge concludes that the policy language is ambiguous. If not, the issue will be moot.

We can say, however, the Plaintiff has now provided an appropriate privilege log and has also provided the Court with copies of the documents listed in the privilege log which predate June 6, 2002, the date that the disputed payments were stopped. The Court has reviewed these documents in camera and finds them to be properly categorized as "privileged." The Court also finds no evidence supporting a bad faith claim in any of the documents.

August 13, 2004

s/Timothy S. Hogan
Timothy S. Hogan
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEFFERSON-PILOT INSURANCE COMPANY,	:	
	:	Case No. C-1-02-479
	:	
Plaintiff,	:	(Judge Spiegel)
	:	
vs.	:	<u>PRIVILEGE LOG</u>
	:	
CHRISTOPHER L. KEARNEY,	:	
	:	
Defendant.	:	

The following documents have not been produced subject to a claim of privilege as specified below.

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
2819	Privileged communication from David Newkirk to J.L. Roberson re: referral of accounting firm	11-14-96
2932	Privileged communication from Harold Shelton to David Newkirk re: payment for Psychiatric Disability Consultants	6-26-96
2934-2935	Privileged communication from Harold Shelton to David Newkirk re: payment for Psychiatric Disability Consultants	6-26-96
2938-2939	Privileged communication from Harold Shelton to David Newkirk with copy of check	7-9-98
2941-2944	Duplicate of 2939 with handwritten notes	7-9-98 6-19-98
2949	Privileged communication from Harold Shelton to David Newkirk re: payment to Psychiatric Disability Consultants, Inc.	5-13-98
3151-3152	Privileged communication from Roberts Mills to William Dempsey re: response to Kearney's counsel	10-23-02

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
3372	Privileged communication showing names of counsel copied on correspondence to Gene Matan	12-4-02
3376	Privileged communication showing names of counsel copied on correspondence to Gene Matan	10-16-02
3382	Privileged communication from Robert Mills to Roetzel & Andress with draft of letter and notes re: Geraldine Johnson review	9-12-02
3419	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	2-22-02
3421-3423	Internal communication of Rotzel & Andress re: set-up of case and conflict check	1-7-02
3430	Privileged communication to Stephanie Farabow, William Dempsey, Robert Mills re: discovery requests	5-15-03
3480	Privileged communication between counsel showing who was copied on correspondence to Matan	12-4-02
3493	Privileged communication between counsel showing who was copied on correspondence to Matan	10-16-02
3497	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	9-27-02
3508-3509	Privileged communication from Geraldine Johnson to Stephanie Farabow and William Dempsey re: status of pleadings	9-10-02
3519	Privileged communication between counsel showing names of people copied on correspondence	8-28-02
3528	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	8-28-02
3544	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	7-29-02
3547	Roetzel & Andress fax confirmation	7-29-02

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
3551	Privileged communication between counsel showing names of people copied on correspondence	7-1-02
3608-3609	Privileged communication from Geraldine Johnson to Robert Mills re: revision of draft of correspondence to Kearney	6-28-02
3610	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	6-27-02
3616	Roetzel & Andress fax confirmation	6-27-02
3623	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	6-17-02
3625	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	6-17-02
3643-3645	Privileged communication from Geraldine Johnson to Stephanie Farabow re: assessment of Kearney case	5-17-02
3646	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	5-20-02
3648	Roetzel & Andress fax confirmation	5-20-02
3649	Privileged communication from Robert Mills to William Dempsey re: fax cover sheet	5-20-02
3651	Fax confirmation sheet	5-20-02
3666	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	4-15-02
3668	Fax confirmation sheet	4-15-02
3669	Privileged communication from Robert Mills to William Dempsey re: fax cover sheet	4-15-02
3671	Fax confirmation sheet	4-15-02
3674	Privileged communication to Geraldine Johnson from	4-12-02

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
	Robert Mills re: fax cover sheet	
3677	Fax confirmation sheet	4-12-02
3678	Privileged communication from Robert Mills to William Dempsey re: fax cover sheet	4-12-02
3680	Fax confirmation sheet	4-12-02
3691	Fax confirmation sheet to Roetzel & Andress	3-13-02
3697	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	2-22-02
3705	Privileged communication between counsel showing persons copied on correspondence to Gene Matan	6-10-02
3707-3717	Privileged e-mail communication between Stephanie Farabow, William Dempsey, Adam Formus and Geraldine Johnson re: pleadings, answers to discovery, payment history	6-6-03 thru 6-2-03
3719-3723	Privileged communication from Geraldine Johnson to Stephanie Farabow re: status of case and assessment	5-27-03
3724	Privileged communication from Geraldine Johnson to Stephanie Farabow and Adam Formus re: pleadings enclosed	5-22-03
3726-3727	Privileged communication between counsel showing distribution of copies	5-21-03
3729-3732	Privileged e-mail communications between Adam Formus, Stephanie Farabow, William Dempsey, Robert Mills, William Hughes, Geraldine Johnson, and Lisa Pluto scheduling conference call between counsel and client	5-21-03
3733-3736	Privileged e-mail between Stephanie Farabow, Adam Formus, William Dempsey, Robert Mills, Todd Ditmar, and Lisa Pluto on behalf of Geraldine Johnson attempting to set-up a conference call	5-20-03

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
3737-3738	Privileged e-mail between Robert Mills, Geraldine Johnson, John Cohill, Stephanie Farabow, William Dempsey and William Hughes re: answers to Interrogatories and request for admissions	5-19-03
3739	Privileged correspondence to Stephanie Farabow, Robert Mills, and William Dempsey from Geraldine Johnson re: proposed answers to request for admission submitted by Kearney	5-16-03
3740-3748	Attorney work product document of draft responses to Defendant's amended request for admissions	
3749-3752	Privileged e-mail communications between Stephanie Farabow, William Dempsey, Robert Mills, John Cohill and Geraldine Johnson re: proposed answers to request for admissions	5-15-03, 5-16-03, 5-19-03
3753-3754	Correspondence to Stephanie Farabow, Robert Mills and William Dempsey from Geraldine Johnson re: draft answers to Kearney's amended request for admissions and questions regarding the same	5-15-03
3755-3762	Attorney work product re: draft answers to plaintiff's responses to amended request for admissions, including attorney notes	
3736	E-mail correspondence to Stephanie Farabow, William Dempsey and Robert Mills from Lisa Pluto on behalf of Geraldine Johnson re: response to request for admissions	3-15-03
3764-3767	Fax correspondence cover sheet to Stephanie Farabow, William Dempsey and Robert Mills from Geraldine Johnson and confirmation sheets showing same	3-15-03
3768	Correspondence to Stephanie Farabow, Robert Mills and William Dempsey from Geraldine Johnson enclosing additional discovery request served by defendant Kearney	3-15-03
3769-3771	Correspondence to Geraldine Johnson from Stephanie Farabow re: bills	3-15-03

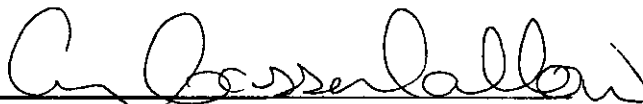
3772	E-mail correspondence from Robert Mills to Geraldine Johnson re: status of Kearney's policies	5-9-03
3773	Duplicate of 3772	
3777-3780	Correspondence to Robert Mills from Geraldine Johnson re: questions asked by counsel for Mr. Kearney	4-21-03
3788-3799	Internal communications from Roetzel & Andress re: billing	2-11-03

In addition, the following privileged documents were inadvertently disclosed. These are clearly privileged communications which should be immediately returned to counsel for Plaintiff.

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
564	Privileged communication from Robert Mills to Geraldine Johnson, William Dempsey, and counsel to client, William Hughes re: response to Kearney letter	6-6-02
568	Privileged communication from Robert Mills to Geraldine Johnson re: fax cover sheet	5-20-02
570-71	Attorney work product: handwritten notes of Geraldine Johnson	None
628-29	Opinion letter and recommendation from Geraldine Johnson to William Dempsey re: status of case and decision to pursue declaratory judgment action	12-21-01
3386-3387	Privileged correspondence from Geraldine Johnson to Stephanie Farabow and William Dempsey enclosing pleadings	9-10-02
3388	Privileged e-mail communication between Stephanie Farabow, William Dempsey and Geraldine Johnson	9-3-02, 9-9-02, 9-10-02
3393-3395	Privileged e-mail communications between Geraldine Johnson and member of her firm re: drafts of motions and cost of process-server	8-20-02 8-14-02
3396	Draft of correspondence to Kearney from Robert Mills with handwritten notes of Geraldine Johnson	8-6-02

<u>Document Number</u>	<u>Document Identity</u>	<u>Date</u>
3397	Correspondence to William Dempsey from Geraldine Johnson re: invoices for legal services	7-12-02
3400-3405	Privileged e-mail communications between Geraldine Johnson, Robert Mills, William Dempsey and William Hughes re: responses to Kearney letters and hand-written attorney work product	6-28-02, 6-6-02, 6-13-02 5-31-02
3406	Attorney work product e-mail between Geraldine Johnson and member of her firm re: jurisdiction for filing declaratory judgment action	5-29-02
3407	Privileged e-mail correspondence between Geraldine Johnson, William Dempsey and Robert Mills re: status	5-20-02
3408-3409	Privileged correspondence from Geraldine Johnson to Stephanie Farabow re: decision to file declaratory judgment action	5-17-02
3410	Privileged correspondence from Stephanie Farabow to Geraldine Johnson enclosing duplicate policies	5-7-02
3411-3413	Privileged e-mail communications between Geraldine Johnson, Stephanie Farabow, William Dempsey re: maternity leave of counsel, need for claims file	5-2-02 4-29-02
3447-3450	Privileged correspondence from Geraldine Johnson to Robert Mills re: questions from Kearney's counsel	4-21-03
3657-3661	Attorney work product draft of complaint for declaratory judgment	None
3688	Privileged correspondence from Geraldine Johnson to Robert Mills re: fax cover sheet	3-13-02

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy Gasser Callow", written over a horizontal line.

William R. Ellis (0012279)

Peter M. Burrell (0044139)

Amy Gasser Callow (0063470)

Wood & Lamping LLP

600 Vine Street, Suite 2500

Cincinnati, OH 45202-2491

(513) 852-6000 (Telephone)

(513) 852-6087 (Fax)

Trial Attorneys for Plaintiff

207276.4